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No. 84-491

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHEVRON CHEMICAL COMPANY,

Petitioner,

v.

RICHARD LEANDER FEREBEE, JR., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION TO CERTIORARI OF RESPONDENTS RICHARD LEANDER FEREBEE, JR., et al.

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QUESTIONS PRESENTED

1. Are the well-settled questions that the Petitioner presents of such importance as to warrant review by this Court?

2. Was the Court of Appeals correct in finding that the well established common law remedies available to respondents under Maryland Law were not preempted given the absence of any Congressional intent in FIFRA to strip them of these remedies?

3. Given the well-settled state of the law and the relatively uncomplicated questions raised by Petitioner, did the United States Court of Appeals for the District of Columbia Circuit clearly abuse its discretion by not certifying these questions to the state's appellate court for decision?

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BRIEF IN OPPOSITION TO CERTIORARI OF RESPONDENTS RICHARD LEANDER FEREBEE, JR., et al.

The respondents, Richard Leander Ferebee, Jr., *et al.* respectfully request that this Court deny the petition for writ of certiorari, seeking review of the District of Columbia Circuit's opinion in this case. That opinion is reported at 736 F.2d 1529.

STATEMENT OF THE CASE

This case is a classic example of a battle of expert witnesses. Richard Leander Ferebee, deceased (hereinafter referred to as Ferebee) originally brought this action against Chevron Chemical Company (hereinafter referred to as Chevron) on May 5, 1981 alleging that he contracted pulmonary fibrosis as a result of long-term skin exposure to dilute solutions of Paraquat, a herbicide Chevron distributes exclusively in the United States. Mr. Ferebee, an agricultural worker at the Beltsville Agricultural Research Center (BARC), an installation of the United States Department of Agriculture located in Beltsville, Maryland had sprayed Paraquat regularly during the growing seasons of 1977, 1978 and 1979. (Ferebee Deposition Transcript R.E. 77A at 29,149). When Mr. Ferebee died as the result of his injury before the first trial, his estate continued with a survival action and his minor children added a wrongful death action on their behalf.

The plaintiffs filed suit in the United States District Court for the District of Columbia on the basis of diversity of citizenship and an amount over $10,000 in controversy. 28 U.S.C. § 1331 (1976). The action was based on the theory that Chevron was strictly liable for Mr. Ferebee's death because its Paraquat labeling failed to warn that skin exposure to the herbicide could cause serious disease and death. Both sides presented substantial expert witness testimony. Their opinions regarding most elements of the case were in direct conflict. The first trial, held from April 19, 1982 through May 6, 1982, ended in a mistrial after the jury announced it was deadlocked. At the second trial, held from October 19, 1982 to November 4, 1982, the District Court properly instructed the jury which then evaluated the facts, applied the law and returned a verdict of $60,000 on the wrongful death count for plaintiffs. That verdict was based

on the jury's determination that Chevron's failure to label Paraquat in a manner which adequately warned that skin exposure to Paraquat could cause serious disease and death made Chevron liable for Ferebee's injuries. *Ferebee v. Chevron Chemical Company*, 736 F.2d 1529 (D.C. Cir. 1984).

Chevron moved unsuccessfully for a directed verdict and a judgment notwithstanding the verdict. *Ferebee v. Chevron Chemical Company*, 552 F. Supp. 1293 (D.D.C. 1982). The petitioner filed its notice of appeal in the U.S. Court of Appeals for the District of Columbia on January 18, 1983. On appeal, Chevron raised the questions presented here as part of "a plethora of bases upon which it asserted that the jury's verdict was in error". *Ferebee*, 736 F.2d at 1532. The court below, after thorough evaluation and analysis of the same issues that are now presented here, issued an exhaustive opinion finding all of Chevron's claims to be without merit and affirming the District Court's judgment. *Id.*, at 1543.

The D.C. Circuit denied both a petition for rehearing and a suggestion for rehearing *en banc* on August 14, 1984.

REASONS FOR DENYING THE WRIT

Petitioner seeks a writ of certiorari on two grounds; neither of which warrants review by this Court.

I. PETITIONER'S QUESTIONS FAIL TO SATISFY THE STANDARDS FOR A WRIT OF CERTIORARI UNDER SUPREME COURT RULE 17.1(C).

A. The Questions Presented Are Not of Such Importance To Warrant Review.

The United States Supreme Court's review of issues on writ of certiorari is not a matter of right, but of judicial discretion and will be granted only when there are special

and important reasons. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 73 (1954), Sup. Ct. R. 17.1. Petitioner has failed to assert that the questions presented involve principles, the settlement of which has importance to the public as distinguished from the parties. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). The Supreme Court Rules limit the writ of certiorari to those cases where the question of federal law is of such importance that it should be settled by this Court. Sup. Ct. R. 17.1(c).

The Court of Appeals has authoritatively analyzed the questions the petitioner presents for review. The court denied petitioner both a petition for rehearing and a suggestion for rehearing *en banc* on the questions. These questions do not warrant further consideration by this Court which is deluged with issues of far reaching importance and impact.

Recent decisions have resolved petitioner's question regarding preemption. *Silkwood v. Kerr-McGee Corp.*, ___ U.S. ___, 104 S. Ct. 615 (1984), *Pacific Gas & Electric Company v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. ___ 103 S. Ct. 1713 (1983). The court below applied these standards in holding that the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136 *et seq.* (1976 and Supp. V 1981) (hereinafter referred to as "FIFRA") did not preclude a jury from imposing liability upon a manufacturer whose inadequate labeling of Paraquat caused an injury. *Ferebee*, 736 F.2d at 1541. This Court's denial of the writ will avoid unnecessary analysis of the well-settled law related to preemption.

The second question, that of certification to a state court, as discussed *infra*, is an academic problem of no continuing public importance.

B. The D.C. Circuit's Decision Is Not In Conflict With Any Other Decision of This Court Nor In Conflict With Any of The Circuit Courts of Appeal

Petitioner has failed to show that the opinion below conflicts with this Court's opinions or with the opinions of its sister circuits. Sup. Ct. R. 17.1(c). The court below, to the contrary, relied on this Court's controlling decisions and correctly applied the preemption and certification standards to the facts before it. No conflicting decision exists in the other circuits.[1]

C. The Petitioner Seeks Only to Retry the Case Thereby Rendering the Question One of Private Importance Only.

The petitioner has failed to articulate why it is vital that this Court decide these questions. Instead, the petitioner has only sought to retry the merits of the case. As Chief Justice Taft stated in *Magnum Co. v. Coty*, 262 U.S. 159, 163 (1923), "the jurisdiction (of the Supreme Court to review cases by way of certiorari) was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing". The petitioner has already received one appellate review of its case. The court below fully considered and correctly decided these same issues relying on this Court's controlling decisions. Petitioner's inclusion of the product label and photographs of its packaging demonstrate that the petitioner is in fact seeking a review of the evidence on which a competent jury based its decision. A writ of certiorari is "not (to be) used to review evidence or discuss specific facts." *U.S. v. Johnston*, 268 U.S. 220, 227 (1925).

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[1]In fact, a New Jersey District Court recently followed the preemption reasoning used in *Ferebee*. *Cipollone v. Liggett Group, Inc.* 53 U.S.L.W. 2175 (D.N.J. 9/20/84).

Chevron has had its day in court. After two procedurally perfect trials, denial of motions for a directed verdict and judgment notwithstanding the verdict, an unsuccessful appeal of the same issues as presented here and denial of motions for reconsideration and rehearing *en banc*, the petitioner steadfastly persists in clogging this Court's dockets with issues that do not warrant this Court's attention.

II. Congress Never Intended to Strip From the State of Maryland the Power to Provide Common Law Tort Remedies to Compensate Victims of Injuries Caused by Exposure to the Inadequately Labeled Herbicide, Paraquat.

The petitioner's contention that FIFRA preempts any state authority from compensating an injured victim exposed to an inadequately labeled pesticide, is without legal or historical support. Chevron's interpretation of FIFRA defeats its express purpose as declared by Congress to protect man and his environment. 1972 U.S. Code Cong. & Admin. News, 3993-3995. More specifically, Congress never intended to preclude state juries from deciding that a herbicide was unreasonably dangerous because of its federally regulated labeling. If such were the Congressional intent, it would have expressly stated that state tort remedies were dissolved. *Silkwood v. Kerr-McGee Corp.*, ____ U.S. ____, 104 S. Ct. 615 (1984), *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

Considerable confidence is placed in the interpretation of state law reached by the federal courts of appeal. *Pacific Gas and Electric*, ____ U.S. ____, 103 S. Ct. 1713 at 1724. The Court below found no merit in Chevron's argument that compliance with the federal regulatory scheme precluded a state jury from reaching a different result. The state law was found to have "broader compensatory goals; . . . a label

may be inadequate under state law, if that label, while sufficient under a cost-benefit standard, nonetheless, fails to warn against any significant risks". *Ferebee*, 736 F.2d at 1540.

Chevron further claims that a state tort action imposes state regulation upon pesticides' labeling which section 136v(b) of FIFRA expressly forbids. That interpretation is not supported by the clear wording of FIFRA or the proper purpose of a state tort suit by jury.

The operative effect of the jury verdict in this case was to award damages for injuries sustained as the result of the use of a pesticide the manufacturer of which inadequately warned of known dangers. Neither the trial court, the jury, the State of Maryland, nor the District of Columbia has ordered Chevron to change its label or restricted Chevron from selling or distributing paraquat because of a defective label. "The verdict itself does not command Chevron to alter its label - the verdict merely tells Chevron that, if it chooses to continue selling paraquat in Maryland, it may have to compensate for some of the resulting injuries." *Ferebee*, 736 F.2d at 1540.[2]

The provision of tort remedies to compensate for personal injuries has always been regarded as a proper exercise of state police powers. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 at 144. These police powers have never been superseded by an Act of Congress unless such was the clear and manifest purpose of Congress. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 at 230. That clear and manifest purpose will exist when Congress has explicitly preempted the precise and specific state action, when compliance with

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[2]Chevron has conveniently ignored the fact that it may apply to the U.S. Environmental Protection Agency to change the warnings on its label.

both Federal and State law would be impossible, or where the state's law stands as an obstacle to accomplishment of the full purposes and objectives of Congress. *Silkwood v. Kerr-McGee Corp.*, ____ U.S. ____, 104 S. Ct. 615 at 621. That situation clearly does not exist in this case.[3]

FIFRA is silent on the issue of preclusion of state remedies for injuries caused by registered pesticides and provides no federal remedy for such injuries. 7 U.S.C. §§ 136 *et seq.*. See *In re Agent Orange Product Liability Litigation*, 506 F. Supp. 737 (S.D.N.Y. 1979) *rev'd on other grounds*, 635 F.2d 987 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981). Echoing this Court's words regarding the Atomic Energy Act, it is difficult to believe that Congress would foreclose the public from any judicial recourse for injuries caused by pesticides just because the federal government registered the pesticide's label. *Silkwood*, ____ U.S. ____, 104 S. Ct. at 623.

III. Petitioner has Failed to Demonstrate that the Court of Appeals Clearly Abused Its Discretion by Not Certifying State Law Questions to the Maryland Court of Appeals for Decision.

Petitioner has failed to demonstrate that the Court of Appeals abused its discretion in not certifying certain ques-

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[3]This Court stated in *Silkwood* that "it is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct". *Silkwood* at 623. The court acknowledged that an award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damages liability but determined that such a state law is not preempted unless "there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law". *Id.*, at 626.

tions of state law to the state's highest court. Clearly the question of certification is strictly a discretionary matter with the court of appeals and not required where state law exists on an issue. *Lehman Brothers v. Schein et al.*, 416 U.S. 386, 390 (1973).

Petitioner's contention that the Court below must follow the certification procedure when it is available and where a novel issue is presented is inapplicable herein given the discretionary nature of the authority and the failure of Chevron to demonstrate any abuse of that discretion. Here, in contrast to *Lehman Brothers*, the Maryland Court of Appeals has addressed the issue petitioner presents as ripe for certification, i.e. misuse by failure to read a label. The issue is not novel but an established element of Maryland product liability law. *Levin v. Walter Kidde & Co.*, 251 Md. 560 (1968).[4]

The close proximity of the District of Columbia and Maryland is another factor supporting the decision below. *Lehman Brothers*, 416 U.S. at 391. Although Maryland and the District of Columbia are not in the same federal jurisdiction, they are contiguous jurisdictions whose federal courts are continuously interpreting each other's local law. As Justice Rehnquist cautioned, in his concurring opinion in *Lehman Brothers*:

> a sensible respect for the experience and competence of the various integral parts of the Federal judicial system

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[4]Chevron chooses to ignore that there was a question of fact as to whether Mr. Ferebee read the label. Given the Maryland Court of Appeal's examination of this issue in *Levin* and its determination that misuse *may*, under certain circumstances, constitute misuse as a matter of law, coupled with the trial court's refusal to make that ruling under the circumstances of the *Ferebee* case, no abuse of discretion has been demonstrated in refusing to certify.

> suggests that we go slowly in telling the courts of appeal or the district courts how to go about deciding cases where federal jurisdiction is based on diversity of citizenship-cases which they see and decide far more often than we do. *Id.*, at 394.

The petitioner wishes to ignore this cautionary admonition by advocating the use of the certification procedure in an instance that will save no "time, energy and resources." (Pet. at 19 quoting *Lehman Brothers*).

CONCLUSION

Chevron's petition for a writ of certiorari should be denied.

Respectfully submitted,

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